101ST CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
101-283

OIL AND GAS FARMOUTS BANKRUPTCY AMENDMENT OF 1989

OCTOBER 13, 1989.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 3152]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3152) to amend title 11 of the United States Code to exclude from the estate of the debtor certain interests in liquid and gaseous hydrocarbons, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of H.R. 3152 is to ensure that the exploration and development of domestic oil and gas is not frustrated by unintended possible effects of the application of the bankruptcy laws. The bill recognizes the unique nature of instruments such as farmout agreements and participation agreements as well as the longstanding practices of the oil and gas industry.

PROCEDURAL BACKGROUND

On August 4, 1989, Congressman Jack Brooks introduced H.R. 3152, legislation to exclude from the bankruptcy estate of a debtor certain interests in liquid and gaseous hydrocarbons. The bill was co-sponsored by Congressmen Mike Synar and Dan Glickman.

H523-20

On September 21, 1989, the Subcommittee on Economic and Commercial Law held a hearing on H.R. 3152. Witnesses testifying in support of the bill were: William Newkirk, on behalf of the Independent Petroleum Association of America ("IPAA"); Linda Russell, on behalf of the Texas Independent Producers and Royalty Owners Association ("TIPRO"); and Hugh Ray of Andrews & Kurth in Houston. Testifying against the legislation were Dean Gandy, on behalf of the National Bankruptcy Conference; and Robin Phelan of Haynes and Boone in Dallas.

The Subcommittee favorably reported H.R. 3152 by voice vote on September 28, 1989.

On October 3, 1989, the Committee on the Judiciary ordered the bill favorably reported, by voice vote.

Background and Summary

To the extent a written lease, sublease, farmout agreement, or participation agreement (hereinafter collectively referred to as "agreements") are used to transfer, or obligate one to transfer an interest in or to liquid or gaseous hydrocarbons, the reasons for their use are similar. They are basically instruments that have been traditionally used in the oil and gas industry to allocate risk so that wells may be drilled. The farmout agreement is the instrument most widely used for this purpose.

Typically, a farmout agreement involves real property rights among at least three parties. The first party, the owner of the property, will enter into a lease arrangement with a second party. In turn, this second party leaseholder (the "farmor") enters into an agreement to assign the oil and gas rights for all or part of the leased land to a third party (the "farmee") if the third party first earns the assignment by drilling a producing well or contributing to the drilling operation in some capacity (such as performing engineering or geological services). A lease owner may grant the farmout because he may not have enough money to drill the well himself, because he may not have a drilling rig available, or because he simply may not wish to drill the well himself.

A participation agreement can be similar to a farmout agreement, but usually involves investor participation. In order to raise the capital necessary to develop an oil and gas prospect, the owner/operator of an oil and gas leasehold, or farmor, frequently sells or "promotes" fractional undivided shares of the working interest to third party investors. They in turn, pledge to pay their proportionate share of drilling and completion costs pursuant to the terms set forth in the parties' operating agreement.

These types of agreements have been and remain essential vehicles for promoting the exploration for and development of our nation's oil and gas resources. They enable wells to be explored that might not otherwise be drilled without the ability to share costs and spread risks that the agreements provide. As Linda Russell testified on behalf of the Texas Independent Producers and Royalty Owners Association:

> Farmout agreements, participation agreements and subleases are among the fundamental contractual relationships which have allowed for development and use of the

> nation's oil and gas reserves over the years. They have appropriately allocated the risk, in what is often a very speculative business, among the various parties involved. They have allowed those owning the land, but not having the resources to develop reserves, to contract with those who have the financing or skill necessary for that development. Similarly, they have allowed those with skill and no financing or reserves to contract in a way which allows that skill to be put to its maximum productive use. Without such agreements, particularly farmout agreements, independent oil and gas operators would long ago have been precluded from participating in the development of the nation's energy resources, to the detriment of the people of * * * the United States.[1]

As a practical matter, these agreements are not always recorded in the local land records. As the witnesses from IPAA and TIPRO told the Subcommittee, there are a number of reasons why recordation does not occur, including the short term and speculative nature of the agreements, the protection of farmees' investments in the drilling operation, the desire to avoid title problems in the event that drilling is not commenced or is not successful, and the inability of the parties to ascertain the full extent of the assignment until after the well has been drilled and is producing.

Once the farmout, participation agreement, lease, or sublease is agreed to, the interest conveyed—often the right to earn an interest in a producing well—becomes the property of the assignee/farmee,[2] not the lease owner/farmor. Relying on this conveyance, the farmee will embark upon costly preparations to drill or contribute to the drilling of a well. The farmee will often actually drill and explore the well, even though the interest the farmee will earn in the lease cannot be fixed until completion of drilling.

Normally, the farmee's substantial monetary investment and reliance is protected because of industry custom and practice. Under the bankruptcy laws, though, there is a chance that if the lease owner/farmor files bankruptcy, the farmee could lose the interest conveyed to it by the farmout, participation agreement, lease or sublease. Since some of these agreements can be executory contracts, a trustee or bankrupt debtor might choose to reject an agreement pursuant to section 365 of the Bankruptcy Code (11 U.S.C. 365), cancelling whatever unrecorded interest the farmee may already have earned. Similarly, under section 544(a)(3) of the Bankruptcy Code (11 U.S.C. 544(a)(3)), the bankruptcy trustee as a hypothetical bona fide purchasor could avoid a debtor's transfer of an unrecorded interest by farmout, participation agreement, lease, or sublease, cancelling the agreement. Under either scenario, the farmee would lose the right conveyed by the agreement to earn an assignment, even if he had already started to earn the assignment—and no matter how much money the farmee had already spent. Whatever interest should have been conveyed would instead

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[1] Statement of Linda Russell Before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, Hearing on H.R. 3152, Sept. 21, 1989, 101st Cong., 1st Sess.

[2] Hereinafter, for ease of reference, "farmee" will be used to denote the person to whom the farmout, participation agreement, lease, or sublease is granted.

revert back to the debtor's bankruptcy estate, unfairly enriching the estate at the farmee's expense.

The current state of the bankruptcy law has created uncertainty surrounding the use of farmouts, participation agreements, leases, and subleases. As the written statement to the Subcommittee from Danny Conklin, Chairman of IPAA, states, "[t]hat uncertainty in inhibiting the ability of operators to finance further development of oil and gas reserves, as well as for financially marginal owners to locate operators to take farmout agreements." [3] Because of the great importance to the nation of an independent energy supply, the Committee believes it is in the national interest for this uncertainty to be eliminated to foster the continued exploration for and development of domestic oil and gas reserves.

H.R. 3152 eliminates the uncertainty and ensures that an interest in oil or gas transferred by farmout, participation agreement, lease, or sublease cannot be cancelled in a bankruptcy proceeding in a manner inconsistent with industry practice. The legislation states that this interest transferred or obligated to be transferred is not property of the debtor's bankruptcy estate—so long as the only way the transfer could have been cancelled if the interest were part of the estate was by action by the debtor or trustee pursuant to sections 365 or 544(a)(3) of the Bankruptcy Code. The result is achieved by an amendment to section 541(b) of the Bankruptcy Code, the section that generally describes property excepted from the debtor's bankruptcy estate.

Though the Committee believes that interests transferred by farmouts and other similar agreements should not be rejected as executory contracts and should not be voidable by the trustee as a hypothetical bonafide purchaser, the Committee does not believe that the right of the debtor/farmor or any other party to challenge a farmout or other agreement under other sections of the Bankruptcy Code, such as the preference or fraudulent conveyance provisions (11 U.S.C. 547, 548), should be altered. In this manner, the bill harmonizes actual oil and gas industry practices with the basic structure and protections of the bankruptcy laws.

Section-by-Section Analysis

Section 1 of the bill contains the amendment to section 541(b) of the Bankruptcy Code (11 U.S.C. 541(b)). The bill creates a new section 541(b)(3) which adds a third category of property not to be included in a debtor's bankruptcy estate. This category consists of any interest of a debtor in or to liquid or gaseous hydrocarbons to the extent that the debtor has transferred or obligated itself to transfer such interest pursuant to the terms of a written lease, sublease, farmout agreement, or participation agreement, or any written agreement related thereto. The category is limited, though, by new section 541(b)(3)(B), to only those interests that, in the absence of the amendment, could have come back into the estate via an action to reject an executory contract under Bankruptcy Code sec-

[3] Written Statement of Danny Conklin, Chairman, Independent Petroleum Association of America, Before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, Hearing on H.R. 3152, Sept. 21, 1989, 101st Cong., 1st Sess.

tion 365, or an action by the trustee as hypothetical bonafide purchaser under Bankruptcy Code section 544(a)(3).

The lease, sublease, farmout agreement, participation agreement, or agreement relating thereto, must be in writing for H.R. 3152 to apply. Oral agreements are not sufficient to come within the protections of the bill's provisions.

No definition of lease, sublease, farmout agreement, or participation agreement is included in H.R. 3152. This decision was deliberate. In the oil and gas industry, so many different types of transactions can be intended by the parties to be farmouts, or participation agreements, that the Committee did not wish to constrain the courts' factual determinations by setting forth a definition that might not be completely precise or inclusive. Since it is the intent of the Committee in enacting H.R. 3152 to bring the bankruptcy laws in line with oil and gas industry custom and practices, the Committee is content to let normal oil and gas industry custom and practices, and state regulation of them, furnish the guidelines for determining whether a writing is a lease, sublease, farmout agreement, or participation agreement that falls within the scope of H.R. 3152.

Section 2 of the bill sets forth the effective date. The legislation will take effect on the day of enactment, but it will not apply to any bankruptcy filed before the day of enactment.

Inflationary Impact Statement

Pursuant to Clause 2(l)(4) of Rule XI of the Rules of the House of Representatives, the Committee estimates that this bill will not have an inflationary impact on prices and costs in the operation of the national economy.

Oversight

This Committee exercises oversight responsibilities with respect to the bankruptcy laws of the United States. No findings or recommendations of the Committee on Government Operations were received as referred to in Rule XI, Clause 2(l)(3)(D).

Cost

Pursuant to Clause 7 of rule XIII of the Rules of the House of Representatives, the Committee states that it concurs with the estimate submitted by the Congressional Budget Office as set forth below.

Budget Statement

Pursuant to Clause 2(l)(3)(B) and (C) of rule XI of the Rules of the House of Representatives, the following estimate was prepared by the Congressional Budget Office and submitted to the Committee.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 4, 1989.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3152, a bill to amend title 11 of the United States Code to exclude from the estate of the debtor certain interests in liquid and gaseous hydrocarbons, as ordered reported by the House Committee on the Judiciary, October 3, 1989. We estimate that this amendment to the bankruptcy code would result in no cost to the federal government or to state or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as H.R. 3152 reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 541 OF TITLE 11, UNITED STATES CODE

§ 541. Property of the estate

(a) * * *

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor; [or]

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case[.]; *or*

(3) any interest of a debtor in or to liquid or gaseous hydrocarbons to the extent that—

(A) the debtor has transferred or obligated itself to transfer such interest pursuant to the terms of a written lease, sublease, farmout agreement, or participation agreement, or any written agreement directly related to such lease, sublease, farmout agreement, or participation agreement; and

(B) but for the operation of this paragraph, the estate could include such interest only by virtue of any action authorized by section 365, or section 544(a) other than paragraphs (1) and (2) of such section.

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DISSENTING VIEWS OF HON. DON EDWARDS

It is a basic tenet of commercial law that a holder of an interest in property can protect that interest against other claimants through the act of public recordation.

In addition to protecting the holder of the property interest, such recordation gives "notice to the world" of the holder's interest, thus allowing innocent third parties to make informed decisions in later transactions related to that same property.[1]

This long-standing commercial law principle has served our country well. It facilitates the free flow of commerce when parties to commercial transactions are able to ascertain existing interests in property. It also operates as a check on fraud, and, without impugning the integrity of the people involved in oil and gas lease farmouts, the potential for fraud inherent in H.R. 3152 does give me great pause.

Mirroring sound public policy, it is implicit in the bankruptcy code that a creditor should be able to rely upon recorded title to property in the debtor's name, and that—as between the interests of creditors and the interests of transferees who fail to record—the good faith creditor should prevail.[2]

Section 544(a)(3) of the Bankruptcy Code (11 U.S.C. 544(a)(3)) reflects such principles. Thus, sec. 544(a)(3) allows a bankruptcy trustee or the debtor-in-possession to cut off unrecorded interests in real property from the bankrupt's estate.

H.R. 3152 would exempt farmees (holders of farmout agreements) from the operation of sec. 544(a)(3) by removing interests transferred by farmouts from a debtor's estate.

I believe such an exemption flies in the face of sound public policy by elevating the interests of a farmee who fails to record over the innocent creditor who—because of that farmee's failure to record—had no way to know of the existing interest.[3]

Further, it is clear that farmees do not need such a exemption to protect their interests. Parties involved in farmout agreements can

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[1] As Mr. Phelan pointed out, there is a long-standing "legal objective of minimizing secret and unrecorded interests in real property." Written testimony of Robin Phelan, Haynes & Boone, on H.R. 3152 before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, 101st Cong. 1st Sess., September 21, 1989 (p. 6).

[2] As Mr. Gandy pointed out:

"The policy decision [of bankruptcy law going back more than 100 years] seems to have been based upon the reasoning that a creditor could rely upon recorded title in the debtor's name to properties and if purchasers from that debtor were foolish enough not to record their interests, as between the innocent creditor and the foolish assignee, the assignee was cut off."

Written Testimony of Dean M. Gandy, for himself and the National Bankruptcy Conference, on H.R. 3152 before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, 101st Cong. 1st Sess., September 21, 1989 (p. 4).

[3] "Many of these [perceived] problems result from a failure of creditors [in this case, farmees] to either protect themselves prior to the bankruptcy or to avail themselves of the rights which they have pursuant to the Bankruptcy Code." Written testimony of Robin Phelan, Haynes & Boone, on H.R. 3152 before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, 101st Cong. 1st Sess., September 21, 1989 (p. 10).

easily protect their interests. Just like holders of any other interest in land, farmees can record their interests in the land records, and in fact many do just that.[4]

If the interest is not fully known, a brief memorandum of farmout providing nothing more than mere notice of the interest can be recorded. This compliance with state law, for a de minimis fee of perhaps $10 to $15, fully protects farmees from having their lien extinguished under the present bankruptcy law in general and sec. 554(a)(3) in particular.

The total lack of any definition of a "farmout agreement" in H.R. 3152 also troubles me deeply. It appears that there is no standard definition of a farmout agreement and the legislation fails to provide one. In fact, we learned during the hearing that "a farmout agreement could be anything that would represent an option or an agreement to acquire an oil and gas lease and, hence, the section becomes highly confusing, would generate a multitude of lawsuits and accomplish little other than to burden an already overburdened court with litigation." [5]

On a final point, if the concern of the proponents of H.R. 3152 is with a debtor's ability to reject a farmout agreement as an executory contract under sec. 365 of the Bankruptcy Code (11 U.S.C. 365), sec. 544 is the wrong section to amend. As was pointed out in testimony received by the Subcommittee on this bill, "it is rationally inconsistent to remove a farmout agreement from the definition of property of the estate".[6] Amending sec. 365 would, in fact, be more consistent with the structure of the bankruptcy code than the approach taken by H.R. 3152 in amending sec. 544.

In summary, dating back to the early days of bankruptcy law, the underpinning philosophy of bankruptcy law has been to treat similarly-situated creditors alike. Unfortunately, legislation such as H.R. 3152 is designed to help just one type of creditor and, in so doing, necessarily hurts many others.

In light of the farmout holder's ability to protect his or her interest by a simple and inexpensive act of recordation, such a result is particularly needless here. I must oppose this bill, which does such damage to the structure and philosphy of the Bankruptcy Code.

DON EDWARDS.

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[4] "Prudent oil and gas investors and parties to farmout agreements record their interests." Oral testimony of Robin Phelan, Haynes & Boone, on H.R. 3152 before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, 101st Cong. 1st Sess., September 21, 1989 (p. 42 of unpublished transcript).

[5] Written testimony of Dean M. Gandy, for himself and the National Bankruptcy Conference, on H.R. 3152 before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, 101st Cong. 1st Sess., September 21, 1989 (p. 5).

[6] Written testimony of Robin Phelan, Haynes & Boone, on H.R. 3152 before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, 101st Cong. 1st Sess., September 21, 1989 (p. 9).

101ST CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
101-287

ANTITRUST CRIMINAL PENALTIES AMENDMENTS OF 1989

OCTOBER 16, 1989.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 3341]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3341) to amend the Sherman Act to increase the fines that may be imposed for a violation of such Act, having considered the same, report favorably thereon thereon without amendment and recommend that the bill do pass.

PURPOSE

H.R. 3341, the "Antitrust Criminal Penalties Amendments of 1989," is an amendment to the Sherman Act that would increase the maximum fines for criminal violations of the Act. The bill would make no change with respect to the penalty of imprisonment under the Sherman Act.

At the present time, the maximum fine that may be levied upon conviction of each count of an indictment under the Sherman Act is $1 million for corporations and $100,000 for individuals. H.R. 3341 would increase the criminal penalty fines to $10 million for corporations and $350,000 for individuals. The Committee considers the current criminal fine provisions, which have been in place for almost 15 years, to be an entirely insufficient deterrent or punishment for the economic crimes forbidden by sections 1, 2 and 3 of the Sherman Act. The bill is thus designed to send an unambiguous signal to potential offenders of our antitrust laws that Congress intends that violations of these statutes be dealt with severely by the judiciary.

H523-21

Procedural History

Congressman Jack Brooks, Chairman of the House Judiciary Committee, introduced H.R. 3341 on September 26, 1989. He was joined on the bill by Congressman Hamilton Fish, Jr., the ranking Republican Member on the Committee.

On June 15, 1989, Chairman Brooks called a hearing of the Subcommittee on Economic and Commercial Law to examine the concept of increasing Sherman Act criminal penalties. Witnesses testifying on this topic at the hearing included Michael Boudin, Acting Assistant Attorney General of the Antitrust Division, Department of Justice; Jeffrey I. Zuckerman, Director of the Bureau of Competition, Federal Trade Commission; Martin A. Coyle, Vice President and General Counsel of TRW, Inc.; and Professor James F. Ponsoldt, University of Georgia Law School (Athens, Georgia).

Subsequent to the hearing, the Committee received a letter from the Department of Justice, dated July 24, 1989, formally recommending that maximum fines for organizations under the Sherman Act be increased to $10 million and not objecting to an increase of the maximum fine for individuals to $350,000.

On September 28, 1989, the Subcommittee on Economic and Commercial Law by voice vote ordered the bill reported to the full Committee. On October 3, 1989, the full Committee, again by voice vote, ordered the bill favorably reported.

Historical Background

The proposed legislation, if enacted, would constitute only the fourth time that the Sherman Act criminal fine provisions have been changed since the Act was enacted in 1890. As originally enacted, the Sherman Act provided for criminal monetary penalties not to exceed $5,000 for violations of sections 1, 2 or 3 of the Act. These sections of the Sherman Act also provided for punishment by imprisonment not exceeding 1 year for any violation of the Act, and that imprisonment could be imposed independently of, or in addition to, a fine not exceeding $5,000.

The penalty provisions remained unchanged for the first 65 years of the Act's existence. However, shortly after passage of the Sherman Act, careful observers of the antitrust laws in practice realized that effective enforcement would require more stringent sanctions. A House Committee, reporting to Congress in 1900—only a decade after enactment of the Act—declared that: "These penalties are deemed insufficient. The illegal combinations in the law mentioned are not deterred by a moment of fear of a fine not exceeding the amount. * * *" H. Rept. 56-1506, 56th Congress, 1st Sess. (1900), p. 2.

In 1912, the House passed a bill raising to $25,000 the fines imposed upon ships of foreign nations entering into United States ports in violation of antitrust decrees in order to: "make more effectual the remedies for violation of the [antitrust] law[s] and * * * to compel foreign shipowners to respect a law which they are now systematically violating." H. Rept. 62-632, 62d Cong., 2d Sess. (1912) p. 2. At approximately the same time, as the Clayton Act was under consideration, there were a number of Members of Congress who urged that the $5,000 penalty be raised to better effectu-

ate the purposes and goals of the antitrust laws. Representative Nelson, of the House Judiciary Committee, commented:

> Attention must be directed, also, to the fact that the maximum fine which is provided in and throughout this bill is $5,000. To fine a great trust a maximum of $5,000, when the loot it gained may have been many hundred times that sum is most ridiculous. The maximum should be much greater in amount. (H. Rept. 63–627, part 3, 63d Cong., 2d Sess. (1912) p. 7.)

The Congress was not the only branch of government to note the incongruence between the size, assets or profits of corporations often charged with antitrust offenses and the amount of the fine levied against them to redress such violations. In 1944, in a separate opinion in *United States* v. *South-Eastern Underwriters Association,* Justice Jackson expressed the following views:

> The antitrust law sanctions are little better than absurd when applied to huge corporations engaged in great enterprise. In the two related Madison Oil cases (see *United States* v. *Socony-Vaccum Oil Co.,* 310 U.S. 150) 15 of the 17 corporations convicted had combined capital and surplus reported to be $2,833,516,247. The total corporate fines on them were $255,000, making a ratio of fines to corporate capital and surplus of less than one-hundredth of 1 percent. In addition, fines of $180,000 were assessed against individuals. In the automobile financing case (see *United States* v. *General Motors Corp.,* 121 F. 2d 376, *Cert. denied,* 314 U.S. 618) General Motors Corp., three wholly owned subsidiaries, and no individuals were convicted. The fines were $20,000. Capital and surplus were then reported at $1,047,840,321, the fine being somewhat less than one five-hundredths of 1 percent thereof (322 U.S. 533, footnote 11 at 591).

Judge Rifkind also railed at the "absurdity" of the antitrust criminal penalty at the time of the imposition of fines in *United States* v. *National Lead* (Cr. 114–455 (S.D.N.Y.)). The Judge commented:

> I cannot even go through the formula of looking the defendant in the eye and saying, "Is there anything you wish to say before I pronounce sentence?" But I must confess that these amounts being substantially the maximum allowed by the statute there is very little I can do or very little reflection that I can give this matter except perhaps to make the inevitable comment that a violation of the antitrust laws which persisted from some time in the early 1920's to the 1940's, with respect to which the criminal liability is discharged by the payment of $5,000 a count hardly seems to me to be the nature of a penalty which is likely to discourage violations of the antitrust laws so far as the criminal laws are concerned, *but that is a problem for the Congress.* (Italics supplied.)

In considering whether to amend the criminal fine penalties, the 84th Congress also had before it a number of examples where the contempt proceedings against defendants for violations of antitrust consent decrees yielded far greater amounts that the original antitrust fine assessed. For instance, in 1953, the Department of Justice simultaneously brought an indictment against several defendants and instituted contempt proceedings for their violation of an earlier antitrust consent decree outstanding against them. The companies were fined $4,200 under the indictment and $100,000 under the contempt proceeding. See H. Rept. 84-70, 84th Cong., 1st Sess. (1955) p. 3.

Following its deliberations, the 84th Congress in 1955 passed an amendment to the Sherman Act, raising the monetary penalty for violations from the original $5,000 to $50,000. No change was made in the authorization for imprisonment of up to one year.

Additional congressional scrutiny about the appropriate level of criminal sanctions for Sherman Act violations was conducted in the next two decades following the 1955 amendment. As a result, the Sherman Act criminal sanction provisions were amended a second time by Congress in the Antitrust Procedures and Penalties Act of 1974. That Act increased the monetary fine for corporations from $50,000 to $1 million and for individuals from $50,000 to $100,000.

Although the Sherman Act penalties have not been amended specifically since 1974, the maximum fines for individuals convicted of antitrust violations have been increased by other generally applicable legislation. The Criminal Fine Enforcement Act of 1984 and the Sentencing Reform Act of 1984, as amended by the Criminal Fines Act of 1987, raised fines for all federal crimes. The effect of such provisions on Sherman Act penalties was to increase criminal antitrust fines for individual offenders from $100,000 to $250,000. The maxium corporate fine of $1 million, as presently appearing in the Sherman Act, has not been affected by such legislation. However, the new laws do provide an "alternative" maximum fine for both corporate and individual offenders of twice the gross pecuniary gain or loss resulting from the violation, unless such a fine would unduly burden or extend the sentencing process.

Given this history, the Committee believes that raising the ceiling on criminal fines for Sherman Act violations, as contained in H.R. 3341, is both appropriate and necessary to continue to combat the economic crimes to which Sherman Act provisions are directed. Since prison sentences in antitrust cases have been exceedingly rare, and since "corporations" can never face imprisonment, the deterrent effect of the existing sanctions may, in many instances, be negligible except for the stigma of conviction. Increasing the Act's maximum penalties would thus likely lessen the possibility that violations of our antitrust laws would be profitable to the offender. However, the Committee harbors no illusions that the mere raising of the criminal fine provisions will ever be a completely effective remedy: only through vigorous enforcement of the competition statutes by the enforcement agencies will the proper level of deterrence and punishment be achieved.

PROVISIONS

Section 1

Section 1 states the short title of this legislation: the "Antitrust Criminal Penaltities Amendments of 1989."

Section 2

Section 2(a) increases the criminal fines for Section 1 of the Sherman Act. The maximum fines are increased from $1 million to $10 million for corporations and from $100,000 to $350,000 for individuals.

Section 2(b) increases the criminal fines for Section 2 of the Sherman Act. The maximum fines are increased from $1 million to $10 million for corporations, and from $100,000 to $350,000 for individuals.

Section 2(c) increases the criminal fines for Section 3 of the Sherman Act. The maximum fines are increased from $1 million to $10 million for corporations and from $100,000 to $350,000 for individuals.

INFLATIONARY IMPACT STATEMENT

Pursuant to Clause (2)(l)(4) of House Rule XI, the Committee estimates that this bill will not have any inflationary impact on prices and costs in the operation of the national economy.

OVERSIGHT FINDINGS

The Subcommittee on Economic and Commercial Law of this Committee exercises oversight responsibilities with respect to the antitrust laws. The favorable consideration of this legislation was recommended by the Subcommittee. The Subcommittee intends to monitor developments under this legislation.

No findings or recommendations of the Committee on Government Operations were received by this Committee as referred to in House Rule XI, Clause 2(l)(3)(D).

COST ESTIMATE

The Committee concurs with the estimate provided by the Congressional Budget Office and adopts that estimate as the cost estimate of the Committee for the purposes of Clause 7(a) of House Rule XIII. Pursuant to Clause 2(l)(3)(C) of House Rule XI, the estimate of the Director of the Congressional Budget Office is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 4, 1989.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3341, the Antitrust Criminal Penalties Amendments of 1989, as ordered reported by the House Committee on the Judici-

ary, Octobert 3, 1989. We estimate that no cost to the federal government or to state or local governments would result from enactment of this bill.

H.R. 3341 would increase the maximum fines that may be imposed for violations of the Sherman Act. While this bill could result in increased receipts to the federal government, CBO has no basis for predicting any such increased receipts.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SHERMAN ACT

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SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding [one million dollars] *$10,000,000* if a corporation, or if any other person, [one hundred thousand dollars] *$350,000,* or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding [one million dollars] *$10,000,000* if a corporation, or, if any other person, [one hundred thousand dollars] *$350,000,* or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

SEC. 3. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding [one million dollars] *$10,000,000* if a corporation, or, if any other person, [one

hundred thousand dollars] *$350,000,* or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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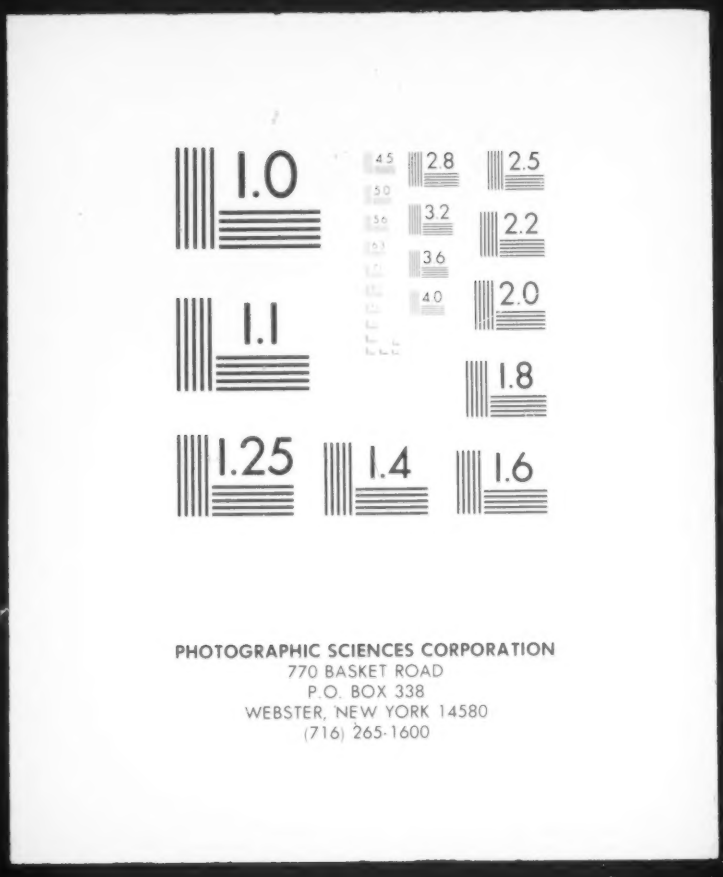

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